

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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GILBERT DEMETRIUS AGUILAR,

Petitioner,

v.

RENEE BAKER, *et al.*,

Respondents.

Case No. 3:12-cv-00397-MMD-WGC

ORDER

I. INTRODUCTION

This action is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Gilbert Demetrius Aguilar, a Nevada prisoner. The respondents have filed a motion to dismiss, arguing that two of the claims in Aguilar's second amended petition are barred by the procedural default doctrine. The Court will grant respondents' motion to dismiss in part, and deny it in part, and will dismiss one procedurally defaulted claim. The Court will set a deadline for respondents to answer Aguilar's remaining claims.

II. BACKGROUND

In its opinion on Aguilar's direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

On the evening of August 7, 1996, a store clerk ejected David and Gilbert Aguilar from a Las Vegas 7-Eleven outlet for drinking alcohol on the premises. Immediately thereafter, without apparent reason or provocation, Gilbert attacked a man seated in his automobile in the store's parking lot. In his attempt to flee, the man struck Gilbert with his automobile. Gilbert was uninjured.

1 After retrieving rifles from their apartment, the pair returned to the 7-
2 Eleven parking lot in search of the man. Thinking that they recognized the
3 driver of a passing automobile, they both commenced firing, striking several
4 cars and houses in the process. Upon hearing the shooting, Mark Emerson,
a nearby resident, stepped outside onto his patio and telephoned the police.
Unfortunately, he was struck by the rifle fire and expired en route to a local
hospital.

5 Police arrested David Aguilar that evening at the scene. Gilbert
6 Aguilar was not apprehended until nine days later. Both brothers were
7 charged and convicted as described. They were tried together in a single
proceeding.

8 (Order Dismissing Appeals, Exh. 5 (ECF No. 30-5).) (Unless otherwise indicated, the
9 exhibits cited in this order were filed by Aguilar and are located in the record at ECF Nos.
10 30 through 53.).

11 Aguilar was found guilty of conspiracy to commit murder, murder with the use of a
12 deadly weapon, possession of a firearm by an ex-felon, two counts of discharging a
13 firearm at or into a structure, and discharging a firearm at or into a vehicle. The State
14 sought the death penalty on the murder conviction. The jury, however, set Aguilar's
15 penalty, for the murder, at life imprisonment without the possibility of parole. The State
16 sought adjudication of Aguilar as a habitual criminal. The state district court ultimately
17 sentenced Aguilar to the following prison sentences, all to run consecutively: for the
18 conspiracy to commit murder, eight to twenty years; for the murder, two consecutive terms
19 of life without the possibility of parole; for possession of a firearm by an ex-felon, eight to
20 twenty years; for each of the two counts of discharging a firearm at or into a structure,
21 eight to twenty years; and for discharging a firearm at or into a vehicle, eight to twenty
22 years. (See Judgment of Conviction, entered January 6, 1998, Exh. 2 (ECF No. 30-2).)
23 David was convicted of the same charges, except for being an ex-felon in possession of
24 a firearm, but was sentenced differently.

25 Aguilar and his brother both appealed; the Nevada Supreme Court consolidated
26 their appeals, and on December 20, 1999, ruling on the merits of their claims, dismissed
27 the appeal. (See Order Dismissing Appeals, Exh. 5 (ECF No. 30-5).)

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1 Aguilar filed his first habeas corpus petition in the state district court on September
2 8, 2000. (See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 7 (ECF No. 30-
3 7).) The state district court held an evidentiary hearing, and then denied the petition in a
4 written order filed on February 8, 2008. (See Findings of Fact, Conclusions of Law and
5 Order, Exh. 14 (ECF No. 32).) Aguilar appealed, and the Nevada Supreme Court
6 reversed and remanded on September 5, 2008, directing the district court to appoint
7 counsel. (See Order of Reversal and Remand, Exh. 16 (ECF No. 32-2).) On remand, the
8 state district court appointed counsel for Aguilar, held a further evidentiary hearing, and
9 again denied Aguilar's petition in a written order filed on March 1, 2011. (See Findings of
10 Fact, Conclusions of Law and Order, Exh. 18 (ECF No. 32-4).) Aguilar appealed, and the
11 Nevada Supreme Court affirmed on March 9, 2012. (See Order of Affirmance, Exh. 21
12 (ECF No. 32-7).)

13 Aguilar initiated this federal habeas corpus action on July 27, 2012. (See Petition
14 for Writ of Habeas Corpus (ECF No. 8).) Counsel was appointed (ECF Nos. 18, 20), and,
15 with counsel, Aguilar filed a first amended habeas petition on December 11, 2013. (ECF
16 No. 30.) Respondents filed a motion to dismiss Aguilar's first amended petition. (ECF No.
17 54.) On September 19, 2014, the Court granted that motion in part and denied it in part;
18 the Court found two claims in the first amended petition to be unexhausted in state court,
19 and granted Aguilar an opportunity to make an election regarding those claims. (ECF No.
20 56.) Aguilar filed a motion for a stay of this action to allow him to exhaust his unexhausted
21 claims (ECF No. 57), as well as a motion for leave to file a second amended petition.
22 (ECF No. 58.) On May 19, 2015, the Court granted both motions. (ECF No. 60.) This case
23 was then stayed, and Aguilar filed his second amended petition — now the operative
24 petition in this case — on June 12, 2015. (ECF No. 62.)

25 Aguilar's second amended petition sets forth six grounds for relief, the sixth with
26 several sub-claims, as follows:

- 27 1. Aguilar's federal constitutional rights were violated because the trial
28 court admitted "highly prejudicial evidence of other wrongs."

2. Aguilar's federal constitutional rights were violated because the trial court admitted "totally irrelevant evidence of a bayonet and machete being found in defendant's apartment."

3. Aguilar's federal constitutional rights were violated as a result of the instructions given to the jury regarding the elements of first degree murder.

4. Aguilar's federal constitutional rights were violated because the trial court refused admission of evidence offered by Aguilar regarding parole eligibility.

5. Aguilar's federal constitutional rights were violated because the trial court allowed the State to file a notice of habitual criminality after the jury's verdicts in both phases of the trial.

6. Aguilar's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel.

6A. Trial counsel "was ineffective for failing to investigate and present evidence that the weapon used to kill the victim belonged to a police officer and that the police officer may have fired the fatal shot."

6B. Trial counsel was ineffective for preventing the admission of evidence that Aguilar had a prior felony conviction.

6C. "Trial counsel was ineffective for failing to investigate and present evidence that the weapon used to kill Mark Emerson belonged to [a police officer] and that the officer may have [fired] the fatal shot."

6D. "Trial counsel was ineffective for failing to effectively prevent the admission of the tainted, unreliable and suggestive extra-judicial and in-court photographic lineup identification...."

6E. "Trial counsel was ineffective for failing to file a motion to suppress the search of Gloria Olivares' apartment."

6F. "Trial counsel was ineffective for failing to prevent the video from the 7-11 from being admitted at trial and for failing to investigate another theory of defense."

6G. "Trial counsel was ineffective for failing to move to suppress the evidence of the palm print of David Aguilar found on the Maadi semi-automatic rifle found in Gloria Olivares' apartment."

6H. "Trial counsel was ineffective for failing to prevent Annette Aguilar from testifying."

Second Amended Petition for Writ of Habeas Corpus (ECF No. 62) at 9-44.

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1 On July 2, 2015, Aguilar commenced a second state habeas action. (See Petition
2 for Writ of Habeas Corpus (Post-Conviction), Exh. 1 to Motion to Lift Stay (ECF No. 64-
3 1).) In an order filed September 14, 2015, the state district court denied Aguilar's petition,
4 finding that it was untimely and successive. (See Findings of Fact, Conclusions of Law
5 and Order, Exh. 2 to Motion to Lift Stay (ECF No. 64-2).) Aguilar appealed, and the
6 Nevada Supreme Court affirmed on April 14, 2016. (See Order of Affirmance, Exh. 5 to
7 Motion to Lift Stay (ECF No. 64-5).) The stay of this action was lifted, on a motion by
8 Aguilar, on June 6, 2016. (See Order entered June 6, 2016 (ECF No. 65).)

9 Respondents filed their motion to dismiss on September 20, 2016. (ECF No. 68.)
10 In that motion, respondents assert that Grounds 1 and 3 of Aguilar's second amended
11 habeas petition are barred by the doctrine of procedural default, and should be dismissed.
12 Aguilar filed an opposition to the motion on October 7, 2016. (ECF No. 69.) Respondents
13 did not reply.

14 **III. DISCUSSION**

15 The Supreme Court has held that a state prisoner who fails to comply with state
16 procedural requirements in presenting his claims is barred from obtaining a writ of habeas
17 corpus in federal court by the adequate and independent state ground doctrine. *Coleman*
18 *v. Thompson*, 501 U.S. 722, 731-32 (1991) (“Just as in those cases in which a state
19 prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the
20 State’s procedural requirements for presenting his federal claims has deprived the state
21 courts of an opportunity to address those claims in the first instance.”). Where such a
22 procedural default constitutes an adequate and independent state ground for denial of
23 habeas corpus, the default may be excused only if “a constitutional violation has probably
24 resulted in the conviction of one who is actually innocent,” or if the prisoner demonstrates
25 cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496
26 (1986).

27 To demonstrate cause for a procedural default, the petitioner must “show that
28 some objective factor external to the defense impeded” his efforts to comply with the state

1 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
2 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
3 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
4 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
5 but that they worked to his actual and substantial disadvantage, infecting his entire
6 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
7 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

8 Alternatively, a procedural default may be excused if the petitioner can
9 demonstrate “that failure to consider the claims will result in a fundamental miscarriage
10 of justice.” *Coleman*, 501 U.S. at 750. A “fundamental miscarriage of justice” occurs when
11 “a constitutional violation has probably resulted in the conviction of one who is actually
12 innocent.” *Murray*, 477 U.S. at 495-96.

13 With respect to Ground 1 — Aguilar's claim that his federal constitutional rights
14 were violated because the trial court admitted prejudicial evidence of other wrongs —
15 respondents point out that the Court previously held that Aguilar did not present that claim
16 in either his direct appeal or his first state habeas action, and that it was therefore
17 unexhausted before Aguilar's return to state court to litigate his second state habeas
18 action. (See Order entered September 19, 2014 (ECF No. 56) at 4.) Further, respondents
19 point out that the Nevada Supreme Court held that Aguilar's second state habeas action
20 was untimely and successive and, thus, procedurally barred, and that Aguilar did not
21 show cause and prejudice under state law to overcome the procedural bar. (See Order
22 of Affirmance, Exh. 5 to Motion to Lift Stay (ECF No. 64-5).) Therefore, Ground 1 is barred
23 in this action by the federal procedural default doctrine, absent a showing of cause and
24 prejudice or a fundamental miscarriage of justice. Aguilar makes no allegation or showing
25 of cause and prejudice to overcome the procedural default. (See Opposition to Motion to
26 Dismiss at 2.) Aguilar does argue, briefly, that failure to consider Ground 1 on its merits
27 will result in a fundamental miscarriage of justice. (See *id.*) His argument, in this regard,
28 is as follows:

1 [T]he prior bad act evidence was incorrect and therefore, fundamentally
2 unfair. The men with whom petitioner had an altercation were not African
American but Hispanic and responsible for this murder.

3 *Id.* This conclusory argument falls far short of the showing of a fundamental miscarriage
4 of justice necessary to overcome the procedural default. Ground 1 is barred by the
5 procedural default doctrine, and will be dismissed.

6 In Ground 3, Aguilar asserts that his federal constitutional rights were violated as
7 a result of instructions given to the jury regarding the elements of first degree murder.
8 Here again, this Court previously held that Aguilar did not present this claim to the Nevada
9 Supreme Court on his direct appeal or in his first state habeas action (see Order entered
10 September 19, 2014 (ECF No. 56) at 4-5), and the Nevada Supreme Court held that
11 Aguilar's second state habeas action was untimely and successive and, thus,
12 procedurally barred, and that Aguilar did not show cause and prejudice to overcome the
13 procedural bar. (See Order of Affirmance, Exh. 5 to Motion to Lift Stay (ECF No. 64-5).)
14 Therefore, Ground 3 is barred by the federal procedural default doctrine absent a showing
15 of cause and prejudice or a fundamental miscarriage of justice.

16 The Court understands Aguilar to make a cause and prejudice argument regarding
17 the procedural default of Ground 3: that because the Ninth Circuit Court of Appeals had
18 not yet decided *Babb v. Lozowsky*, 704 F.3d 1246 (9th Cir. 2013), when his first state
19 habeas action was concluded, he could not have raised the claim in that action, and,
20 therefore, there was cause for his procedural default. (See Opposition to Motion to
21 Dismiss at 2-3; see *also* Motion for Stay and Abeyance (ECF No. 57) at 4 ("The law that
22 supports this ground, [*Babb*], hadn't yet been published until after Petitioner concluded
23 his post-conviction case, and this ground could not have been raised in that state
24 appeal.")) The Court finds this to be a colorable assertion of cause to overcome the
25 procedural default of Ground 3. However, the Court finds that the parties have not
26 sufficiently briefed the issue with respect to the motion to dismiss, and that, at any rate, it
27 appears that the cause and prejudice analysis is intertwined with the merits of Ground 3
28 such that the issue of cause and prejudice relative to the procedural default of that claim

1 will be better addressed in conjunction with the merits of the claim. The Court will deny
2 respondents' motion to dismiss with respect to Ground 3, without prejudice to
3 respondents' asserting, in their answer, their argument that this claim is barred by the
4 procedural default doctrine.

5 It is therefore ordered that respondents' motion to dismiss (ECF No. 68) is granted
6 in part and denied in part. Ground 1 of petitioner's second amended petition for writ of
7 habeas corpus is dismissed. In all other respects, the motion to dismiss is denied, without
8 prejudice to respondents' asserting, in their answer, their argument that Ground 3 is
9 barred by the procedural default doctrine.

10 It is further ordered that respondents must, within ninety (90) days from the date
11 of this order, file an answer, responding to the claims remaining in petitioner's second
12 amended petition for writ of habeas corpus.

13 It is further ordered that, in all other respects, the schedule for further proceedings
14 set forth in the order entered on June 6, 2016 (ECF No. 65), will remain in effect.

15 DATED THIS 29th day of November 2016.

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18 MIRANDA M. DU
19 UNITED STATES DISTRICT JUDGE
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